Missouri Bankers Association
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July 22, 2011 **VIA EMAIL regs.comments@federalreserve.gov**

Jennifer J. Johnson
Secretary, Board of Governors of the Federal Reserve System
20TH Street and Constitution Avenue, NW
Washington, D.C. 20551

RE: Docket No R-1417
Proposed Rule to Amend Federal Reserve Regulation Z to comply with the Dodd Frank Act

Dear Ms. Johnson:

The Missouri Bankers Association (MBA) is a commercial bank and savings association advocacy group representing about 350 banks. These comments are being submitted on behalf of these Missouri banks and savings and loan associations, as a result of the request for comment on the Federal Reserve System's proposal for Regulation Z comments on the Ability to Repay. The MBA wishes to express its great concern that the four options on the Ability to Repay secured by a dwelling (with minor exceptions) that implements the Dodd-Frank Wall Street Reform and Consumer Protection Act (DFA) narrow opportunities to make qualified residential mortgages that will in fact be repaid by the borrower.

Without knowing the details of the sub- markets throughout the nation, DFA and the Federal Reserve proposal tie Missouri's experience to the worst experience in the four states with extremely high rates of default and foreclosure: California, Nevada, Arizona and Florida.

Many of the comments contained herein are taken from the American Bankers Association Draft comment letter. However with a very large number of community banks many without the resources to employ the sophisticated technicians that may be necessary to comply with these rules, changes are all the more necessary. This and other DFA regulations are an enormous boom to lawyers, accountants, compliance speakers and other vendor selling banks services, but not to the banks and the customer they serve.

Background The Federal Reserve Board (FRB) published for public comment a proposed rule to implement the ability-to-repay requirements for closed-end residential loans in the Federal Register for May 11, 2011, as mandated by Sections 1411, 1412 and Portions of 1414 of DFA

Consumer Protection Act for all covered mortgages. The minor exceptions not covered in this proposal include open-end credit plans, timeshare plans, reverse mortgages, and temporary loans.

The proposed changes are meant to implement the DFA amendments where creditors are prohibited from making a mortgage loan unless there is a reasonable and good faith determination, based on verified and documented information, that the **consumer will have a reasonable ability to repay the loan**, including any mortgage-related obligations like real estate taxes.

Effects of the New Ability-to-Repay These regulations will set the bottom threshold for underwriting standards that all mortgage loans must adhere to. As such, these new provisions will completely alter the legal and underwriting foundations of the mortgage lending system. These proposed rules apply broadly to both owner-occupied and non-owner-occupied property loans. As such, these proposals have great impact on all aspects of mortgage lending—they modify the legal responsibilities of lenders and loan originators, they fundamentally impact the types of products offered to the public, they affect channels and systems used to deliver these loans to consumers, and influence the very cost and price of mortgage loans across all markets. MBA believes that it is crucial that regulators draft this rule with great care to both detail and to overall structure.

Fundamental Considerations for this Rulemaking There are three important structural elements that policymakers must consider with regard to these ability- to-repay rules. These structural elements are crucial to understanding their effect on mortgage lending, and how they will ultimately work when applied to the real market.

1. Non-ATR Loans Are Prohibited Mortgage loans that do not meet the proposed "ability to repay" standards, or the safe harbors, will be effectively proscribed. Congress states that no creditor may make residential mortgage loans unless "ability to repay" is established pursuant to Section 129C requirements. In short, the rules being proposed today will serve to delineate the universe of legal and acceptable loans—all mortgage lending will have to occur within the proposed rules boundaries, and no legal mortgage lending may exist outside of it.

The addition of these broad standards and prohibitions on the rulebooks means that regulators will develop new enforcement procedures, and examination staff will develop new examination guidelines, to ensure that such loans are not made. Likewise, secondary market players and investors will have to ensure that none of the loans they purchase fall outside the standards set forth by this rulemaking.

1. TILA Structure & Liability First, the "ability to repay" rules will be controlled by the penalties and liabilities that are contained in TILA, and that have been significantly expanded by DFA. When added together, these new liabilities are tremendously expansive. Lenders that violate repayment ability requirements will be subject to:

- Expanded damages applicable to Home Ownership and Equity Protection Act (HOEPA) loans, which would include an amount equal to the sum of all finance charges and fees paid by the consumer.

- A lengthened statute of limitations of three years.

- Recoupment or set-off provisions, where the consumer will be allowed to raise a violation of these provisions against the creditor or an assignee in connection with judicial or non-judicial foreclosures or other action to collect the debt as a matter of defense. Violations of the ability-to-repay rule will subject creditors to all TILA remedies, including the enhanced civil remedies that apply to violations of TILA's high-cost loan rules (as described above). These provisions apply regardless of the statute of limitation.

- New enforcement authorities by state attorneys general.

<u>2. Assignee Liability</u> Second, the DFA law amplifies liabilities for loan assignees. The new legal structure would attribute liability under this section to the holders of mortgage loans for the acts, errors and omissions of originators and other settlement service providers. Note that such liability would include magnified monetary liability as well as rescission and/or recoupment actions under the underlying mortgage loans. New Section 130(k) of DFA allows the consumer to sue creditors, assignees or holders of the mortgage loan, notwithstanding any other provision of law, for recoupment or set off. This explicit attribution of risk to any and all holders will greatly exacerbate risks that assignees are likely to face with respect to any mortgage-backed assets.

<u>Impact on Market Structure</u> MBA cautions that the various structural elements identified above will mean that the legal protections afforded by the Qualified Mortgage provisions will be more than just necessary—indeed, they will be compulsory to establish the legal assurances that lenders and investors to safely operate in the mortgage market going forward.

- Heightened penalty provisions under this new law are draconian, and lenders will make it a priority to ensure that they do not get close to violating its strictures. The rational response to the type of severe penalties contained in this law is that the affected entities, including all commercial banks and savings institutions, will seek absolute assurance against its risk. The safe harbor's legal protections are the only viable method to ensure against liability risk posed by this law.
- Secondary markets will demand safe harbor status for purposes of quality assurance, risk avoidance, and efficiency in guaranteeing compliance.
- The litigation realities are such that virtually any consumer who defaults for non-payment will be tempted to sue for recoupment in connection with any resulting foreclosure on the ground that the creditor violated the ability to repay requirement. The potential for this liability—and the reality that such liabilities will be decided by disparate judges across many jurisdictions—will create a particularly strong incentive a move towards origination of safe "qualified mortgages."
- By stratifying the market, this law produces, perhaps inadvertently, a structure of "superior" vs. "inferior" mortgage loans. (It is likely that non-QM loans will be deemed to be a category of "subprime" loans.) This market stratification necessarily forces

adjustments in risk assessments that will price these loans accordingly. Insurance entities, investors, regulators—all players with a stake in mortgage lending—will assess the market in accordance to the "QM-vs.-Non QM" dichotomy This may not be the legislative intent, but market realities do not necessarily follow Congressional objectives.

- The stratification of the mortgage market creates a palpable reputational risk for mortgage market players. Banks are very reliant on community trust, and no institution will want to become known for making any level of "inferior" loans.
- Heightened risk of scrutiny from regulators: In the same way that high cost loans generate more intense scrutiny from regulators in terms of fair lending and other analysis, the presence of non-QM mortgages will create greater risks of scrutiny and investigation from regulators. In addition, once finalized, regulators will surely assess and regulate upon the increased legal risks that emanate from non-QM loans as posing greater "safety and soundness" hazards.
- Given the experience of the past few years, the servicing of loans has become riskier and more expensive. Servicing non-QM loans will be deemed riskier, thus more expensive in terms of servicing costs.

<u>The Importance of a Qualified Mortgage</u> For all the reasons set forth above, MBA believes that the majority of lenders, particularly regulated depository institutions, will seek to operate only within the Qualified Mortgage segment, and will entirely avoid making loans outside this safe harbor.

MBA believes, therefore, that the QM standards must be crafted with the full realization that it is highly likely to comprise, by far, the largest portion of mortgage lending.

HOEPA as Historical Precedent: The experience with HOEPA loans provides an excellent illustration of this potential, as the legal dynamics involved with the HOEPA legislation are almost identical to the QM rule-making.

- HOEPA loans are rare, and lenders avoid them because of the reputational and legal risks inherent in the "HOEPA" label.

- Secondary Market for HOEPA loans is practically non-existent.

- HOEPA loans <u>can</u> be underwritten in a very safe manner and a market could have developed to assess the risks in this market segment. However, the governmental label of "HOEPA" made those loans unmarketable. The actual risk and viability of any particular HOEPA loan did not matter—that which mattered was that such loans carried a negative governmental label, and eventually, funding for those loans completely dried up. Lenders will avoid the riskier segments, and discard such segments if there is a governmental imprimatur implying they are inferior or potentially dangerous.

- Note that penalties for violating the ATR rules are the same as HOEPA. We cannot expect a different market reaction when these rules get finalized.

- Note that HOEPA loans did go into practical extinction because lenders feared that they could not make them in a compliant manner. They disappeared because of the legal and reputational risks that flowed from the origination of such loans and from even inadvertent breaches. Experience there demonstrates tat lenders and investors took flight to segments where they would not be seen as making "dangerous" loans, and where they could "assure" that draconian penalties would not arise. The same process will apply in the present instance.
- In summary, lenders will seek to lend where they are protected from massive penalties. Even if banks are confident that they can make a loan with all indicia of repayment ability, the liabilities are so high that they will avoid any segment where the risks are

<u>Alternative 1 verses Alternative 2.</u> The proposed rule sets forth two alternatives for legal protections to be afforded to lenders pursuant to the qualified mortgage safe harbor provisions of Section 1412. Under the first approach, a creditor that makes a mortgage loan that satisfies certain specific conditions that meet the qualified mortgage provisions would be entitled to "safe harbor" protections with regard to the repayment ability determination requirements. Under the second proposed approach, a creditor making a qualified mortgage loan and satisfying the conditions specified in the first alternative plus additional underwriting elements would be entitled to "rebuttable presumption" of compliance with the repayment ability determination requirements.

The Board is soliciting comments on these two alternatives because it finds that DFA is not clear as to whether a qualified mortgage is eligible for a safe harbor or a rebuttable presumption. In the proposed rule's preamble, the Board posits that "it is unclear whether that protection is intended to be a safe harbor or a rebuttable presumption of compliance with the repayment ability requirement."

MBA appreciates that the statute lacks full clarity on whether the protections offered under DFA are intended to be a safe harbor or a mere presumption of compliance with the repayment ability requirement. MBA believes, however, that the structural arrangement of the "qualified mortgage" provisions leads to the conclusion that the legal protections under Section 1412 necessarily constitute full "safe harbors" and only the special protections afforded by such a safe harbor would ensure that the legislative objectives are met. Apart from the statutory order and legislative organization, MBA believes that the final rule must recognize that market realities require that a safe harbor provision, with the full protections it offers, be adopted in the final rule.

<u>Specific Missouri Impact</u> Missouri is a state that adopted a conservative lending tradition and stayed with into the 21st Century; a review of Missouri exemptions from attachment by creditors including bankruptcy, see Section 513.430. RSMo. See also chapter 443 RSMo. and case law for the continued use of non-judicial foreclosure; lenders believe this in fact delays foreclosure since the entire process may be completed in 30 days or less, more than 90% of foreclosures are in this category. Case law is only useful in defining the outer limits of non-judicial foreclosure. For all

the reason presented, a rebuttable presumption would open up a closed door to additional plaintiff attorneys' efforts to overturn the lending system that has served the lenders, the state and the people of Missouri for almost 200 years.

- *Canons of Statutory Construction:* Principles of statutory interpretation hold that the title of a statute or section can aid in resolving an ambiguity in the legislation's text. The header of a section may shed light on the section's basic thrust.
- *Need for Lender and Investor Confidence:* Lenders and investors must enjoy certainty that their loan cannot be capriciously challenged. The only way to ensure predictable originations under these complex rules is to provide.
- *Mere Presumptions are Insufficient and Inconsistent in the Statutory Scheme:* Mere rebuttable presumptions would not work in the current context, as they provide only illusive protections for lenders. Once the opposing side presents facts that show the presumption to be wrong, the judge or jury may ignore it.

> Given that the provisions analyzed here constitute a determination of a consumer's ability to repay, ABA is particularly concerned that the proposed ability to repay requirement would lead to situations in which borrowers whose loans are delinquent or are about to go into foreclosure would file suit against the lender, arguing that the borrowers were put into loans that were unaffordable and that the lender should not be permitted to foreclose on the properties. This part of the rule potentially sets up creditors for frivolous challenges every time a borrower defaults: the argument would be that the mere fact that a default occurred means that the creditor evidently did not adequately consider the borrower's ability to repay. Since the standard for rebutting the QM presumption is varying and hazy, the potential for protracted, expensive litigation is enormous.

MBA believes that any such safe harbor should make certain that consumers are assured full legal guarantees that their loan is affordable and safe. ABA is advancing an alternative set of more robust standards than those offered by the proposed rule to ensure that borrowers are well protected. These additional recommendations are set forth below.

<u>Points and Fees Test</u> The DFA legislation requires that the special legal protections contained in the qualified mortgage classification be afforded only in transactions where total "points and fees" do not exceed 3 percent of the total loan amount. This condition is significant, as it strictly demarcates which transactions may qualify for QM treatment. As described above, since we believe the market will be concentrated within the QM category, the ability to qualify for QM treatment will largely determine which lenders participate in the market and what products are offered to consumers. In short, the formula for "points and fees"—its threshold level and how it is defined—will determine market entry and lender participation, and will therefore profoundly shape pricing and loan availability.

MBA believes that the proposed points and fees test is extremely rigid and limiting and will, if finalized in its current form, greatly constrain the ability of banks to enter the mortgage market. The definitions that apply to "points and fees" and "total loan amount" would be the same definitions that apply to HOEPA loans. This formula is extremely complex and contains definitional contortions that make it difficult to ascertain its precise application.

Below, MBA describes the more problematic elements of the proposed "points and fees" test.

1. Loan Size and Formula For loans of $75,000 or greater, the proposed points and fees cap would be three percent of the total loan amount. The Fed proposes two approaches to the points and fees cap for loans that are less than $75,000. The first approach includes four proposed points and fees levels, based on the loan amount:

    - percent of the total loan amount for loans of $60,000 to less than $75,000.
    - 4 percent of the total loan amount for loans of $40,000 to less than $60,000.
    - 4.5 percent of the total loan amount for loans of $20,000 to less than $40,000.
    - 5 percent of the total loan amount for loans less than $20,000.

    The second approach would provide for a cap of five percent of the total loan amount for loans less than $20,000 and the following formula to determine the cap for loans of $20,000 to less than $75,000:

    - Total loan amount – $20,000 = $Z
    - $Z x .0036 = Y
    - 500 – Y = X
    - X x .01 = Allowable points and fees as a percentage of the total loan amount

    The stated intent of the latter multi-formula approach is to avoid certain anomalous results that small loan amounts would have under the first approach. The Board recognizes that the second formula approach adds a great deal of complexity and would represent high degree of difficulty to smaller creditors in their compliance efforts.

    Missouri Impact This is very impractical since the cost of "putting a loan on the books"; such loan has a base cost plus a consideration for risk, particularly when the real estate market is unsettled or the rural area has a decreasing population. Many modest homes in rural Missouri will not be financed through the banking system, but will revert to loans from relatives and acquaintances in the "grey market". This is counter-productive and the state economy will suffer as a result.

2. Definitions-Originator Compensation The term "points and fees" is defined by reference to the definition of that term in the DFA's revised high-cost mortgage threshold rules. In the high-cost provisions, the term "points and fees" includes, among other elements, all compensation payable directly or indirectly to loan originators. The broad reference to "loan originators" would sweep in compensation that is paid to third-party mortgage brokers, table-funding creditors, as well as in-house loan officers. A "loan originator" is defined by reference to the definition set forth in the Federal Reserve Board's recently finalized loan originator compensation rule. (See Section 226.36(a) of Regulation Z.) This compensation of payments to loan originating employees is therefore broadly

defined to include commissions, bonuses, trips, prizes, and hourly pay for the actual number of hours worked on any particular mortgage loan.

It is difficult to overstate the impact of this definitional provision—in short, the inclusion of any compensation paid directly or indirectly by a consumer or creditor to an employee loan originator will severely limit the ability to qualify for the QM protections.

Impact in Missouri MBA suggests that federal bank regulators may see points and fees for productive "employee loan originators" as payment for work that should be done almost like a regulator in a paced federal bureaucratic day in day out routine. The truth of the matter is that loan originators work reaches a high of 12 to 14 hours a day at a peak time of lending and perhaps unemployment when there is no loan demand. The American banking system works best when financial incentives are available for loan orginators, perhaps with some modest claw back feature to guard against overly aggressive lenders. Many areas of the state don't have the qualified real estate demand that fully employs their current loan originators and so these employees will be creative to keep the banks' doors open.

3. Definitions-Affiliates: In the proposal, the Board is asking for input on whether to include in the definition of points and fees those amounts paid to entities that are affiliated with the creditor. The Board notes that Congress appears to have rejected excluding from points and fees real estate-related fees where a creditor would receive indirect compensation as a result of obtaining distributions of profits from an affiliated entity based on the creditor's ownership interest in compliance with RESPA. The Board requests comment on the proposal not to exclude from the points and fees calculation for qualified mortgages fees paid to creditor-affiliated settlement services providers.

   Impact in Missouri: Creditor-Affiliated Settlement Service Providers There should be an exclusion from points and fees calculation when the affiliates, be they appraisers, title insurance agents, surveyors, and/or other vendors is convenient and provides equal or less expensive services as documented locally. If this is adopted there may be other legal barriers to overcome. **However, change to push doing something is unproductive**. For example, a recent effort at reform to limit banks from the choice of residential real estate appraisers, lead to federal law on real estate management companies and Missouri state implementing legislation, see HB 1692 (2010). Many banks report this has resulted in a great variation in appraisal, mixing forced sales, out of area sales, and inexperienced less expensive appraisers.

Industry Recommendations

In light of all the comments above, we urge that the Bureau revisit a number of details contained in this proposal. It is clear that the new ability-to-repay requirement will generally apply to all mortgage transactions going forward, and such near universal scope creates the imperative that the rules and standards proposed in this regulation be very precisely calibrated. These ability-to-repay rules will categorically prohibit transactions that fall outside of its strictures, and any violation will bring extensive liability to lenders and assignees. Since virtually no lender will opt to operate outside the boundaries of the QM, it is essential that policymakers fully understand the importance of the safe harbor protections under this new regulatory regime.

To assist the regulators in finalizing these rules, MBA has adopted the ABA alternative approach to the “Qualified Mortgage” elements of this proposed rule. These recommendations are similar to proposals offered by other industry representatives with a stake in mortgage transactions.

MBA would support a set of QM standards that are generally consistent with those proposed by the Board, and with changes to the points and fees calculation. A most important element of this alternative approach is that the proposal requires that the rules be finalized with full safe harbor protections (as per Alternative 1).

To that end, we note that DFA grants the Bureau with great discretion to shape these new rules. Congress afforded the Bureau broad authority to modify the qualified mortgage requirements, and granted broad authority to revise, add to, or subtract from the criteria for determining what constitutes a qualified mortgage. The Act allows regulators discretion to make changes “upon a finding that such regulations are necessary and proper to ensure that responsible, affordable, mortgage credit remains available to consumers.” MBA urges that the Board use this authority to tailor the proposal along the lines suggested below.

Points and Fees

MBA believes the three percent limit on points and fees requires significant adjustment. First, based on data that has been developed by lenders, the definition of smaller loans demanding an adjustment should be increased to $150,000.

Second, whether the customer chooses to use an affiliated provider of the lender or not, the bona fide charges for such non-lender service should be excluded from the calculation.

Third, while the compensation to originator companies should be excluded from the calculation in light of the recent loan originator compensation rule, at a minimum the payments by borrowers to creditors and brokerages as well as the compensation they in turn permit their originators should not both be counted. Double counting in this manner is simply unfair.

Fourth, MBA requests the up-front mortgage insurance premium exclusion set forth in DFA be eliminated.

QM Safe Harbor

Our adoption of the ABA recommendations, are proposed in lieu of both of the QM safe harbor proposals from the Board. It would include standards proposed to satisfy the general ability to repay standard, the presumption of compliance, and also include the standards proposed for the general QM safe harbor.

Under this proposal, a creditor or assignee must evidence that a loan satisfies these standards (or satisfies the requirements of the balloon safe harbor or the non standard mortgage safe harbor) to be deemed to be in the safe harbor to comply with the ability to repay requirement. Requirements for satisfaction of the standards are contained in the commentary to the rule and should be made part of the rule.

In order to assure a workable safe harbor, documentation such as a written application signed by the borrower should be prescribed. A final application would show how the loan was underwritten by the lender to qualify the borrower and restate the required product standards. A creditor or assignee may demonstrate compliance with these standards with evidence of written and/or automated compliance using physical or electronic records; (1) borrower's written signed application; (2) creditor or assignee's worksheets; (3) third party records; (4) evidence of use of a widely accepted standards such as FHA or GSE guides; and/or (5) evidence of use of third-party automated systems, as appropriate. (The definition of third party record requires clarification to ensure that electronic records are permissible.)

Finally, a creditor or assignee should be allowed to use assets to compensate for income under the underwriting factors set forth below, to the extent creditor or assignee can demonstrate repayment ability using such compensating factors. Also, the final rule needs to retain flexibility in assessing consumer credit histories. The rule and commentary must permit flexibility in deciding particular credit criteria to address self employed borrowers and borrower's with thin files to use rental records, etc., in lieu of standard scoring or credit criteria.

QM Qualification Standards:

In order for a loan to qualify for the QM safe harbor, the loan ***must not:***

1. Result in an increase in principal balance post closing (no negative amortization);

2. Allow deferment of principal or a balloon payment (except if balloon payments may occur under a balloon payment qualified mortgage);

3. Have a term exceeding 30 years (except in conjunction with a loan modification to provide a borrower a loan with a lower monthly payment than he or she may otherwise face);

4. Have total points and fees that exceed 3 percent of the total loan amount with (i) appropriate adjustments for smaller loans; (ii) appropriate exclusions for third party fees regardless of affiliations; (iii) exclusions of employee compensation to avoid double counting and (iv) the exclusions otherwise excluded in the proposal, as examples, certain up-front mortgage insurance premiums and up two discount points.

In order for a loan to qualify for the QM safe harbor, a creditor ***must*** underwrite the mortgage:

1. Based on the *highest rate during the first five years;*

2. Using a payment schedule that fully amortizes the loan over the loan term and takes into account any mortgage related obligations;

3. Consider the following :

    a. The consumer's current or reasonably expected Income or assets, other than the value of the dwelling that secures the loan. *Creditor must verify the amounts of income or assets it relies on to determine consumer's ability to repay transaction.*

    b. If creditor relies on income from the consumer's employment in determining repayment ability the consumer's current employment status. *Creditor may verify consumer's employment orally if creditor prepares record of oral information*;

    c. The consumer's monthly payment on the covered transaction, calculated in accordance with paragraph (c)(5) of this section;

    d. The consumer's monthly payment for mortgage related obligations. *From general standard;*

    e. The consumer's monthly payment on any simultaneous loan that creditor knows or has reason to know will be made, calculated in accordance with paragraph (c)(6) of this section. *Creditor's policies and procedures must require the consumer to state the source of the down payment;*

    f. The consumer's current debt obligations. *If creditor relies on credit report to verify debt and a consumer's application states an obligation not shown in report, creditor need not independently verify such obligation. Creditor may look to FHA and other guides to define debt;*

    g. Consumer's monthly debt-to-income ratio or residual income. *Creditor must consider debt-to-income or residual income and use widely accepted governmental and non-governmental standards in defining income and debt including FHA and other guides.*

MBA believes that these more expanded QM standards would better protect consumers than either of the standards set forth in the proposed rule's alternatives. Combining these suggested standard with a firm safe harbor would result in a legal design that would afford creditors with the confidence they need to lend, and would properly shield borrowers, as the statute intends.

Select Answers to Board's Solicitation for Comment

The Board states that it does not believe that amending the definition of "mortgage originator" to Regulation Z's definition of "loan originator" is necessary at this time, and is soliciting comments on the decision of foregoing such changes on this rulemaking.

- MBA agrees with the Board that there is no need to amend the definitions of mortgage loan originator at the present time. We observe that the efforts pertaining to the recent rulemaking on MLO compensation are causing widespread confusion for banks across the country. Although MBA urges that the Bureau engage in immediate clarifications to a myriad of open questions, those issues are separate from those discussed in this rulemaking. More specifically, the matters that require most urgent interpretation in the MLO compensation rule do not involve the types of definitional details raised by the Board. We do not believe that the Bureau should spend any time engaging in piecemeal adjustments to other regulatory subdivisions of TILA as it implements these extremely important rules.

The Board solicits comment on whether it should exercise its discretionary authority to replace "annual percentage rate" with "transaction coverage rate" as the loan pricing benchmark for higher-priced covered transactions in all these instances. The Board also solicits comment, and supporting data, on whether it should exercise its authority under TILA Sections 105(a) and 129B(e) to incorporate a special, separate coverage threshold in the proposed definition of "higher-priced covered transaction" for loans secured by non-principal dwellings, and what rate threshold would be appropriate for such loans.

- As per previous proposals, the Board is again seeking to replace the APR as the index that a creditor compares to the average prime offer rate (APOR) to determine whether the transaction triggers TILA's higher priced mortgage loan rules. The proposed change would provide that a creditor determine whether a transaction is an HPML by using a brand new metric, dubbed the "transaction coverage rate," rather than the current annual percentage rate, and compare that to the APOR. The proposed "transaction coverage rate" would, according to the Board, be a modified version of the transaction's annual percentage rate, and would be more comparable to the APOR. This new figure would not be disclosed to consumers. It would serve only to determine whether a loan qualifies as an HPML loan.

  This proposed reformulation for HPML triggers is not required by the statutory amendments, and in previous proposals, this formula has been deemed convoluted and unnecessary by practically every segment of the real estate lending industry. MBA strongly encourages that the Bureau refrain from making any changes to the HPML triggers until the Bureau can properly analyze the impact of these changes, on their own merit, and until it can properly coordinate these changes with the other high-cost changes that are being mandated by DFA.

  There the tremendous burdens that this definitional change will have on banks, so we reiterate them here. We request that the Bureau recalculate the impact of these regulations upon financial institutions—they will reveal the very high burdens that these amendments would cause. Analyzing only the changes to HPML triggers, banks will be required to make very broad system adjustments at many levels. The technology systems that ensure proper compliance with regulations and that generate the proper disclosures for individualized transactions are integrated rather than isolated. A change to the HPML triggers will force a change in compliance software. These changes must be identified, incorporated into existing systems, and tested to ensure that they respond adequately to all product lines. As the Board recognizes in the preamble, this must be accompanied by training and educational costs. The proposed amendment will impose new guidelines with investors and lending partners, which will require an additional set of implementation resources. Since the HPML triggers define the market segments that banks are able to serve, this change redefines the scope of our product offerings—the proposed change will require a reconsideration of most product lines and their pricing. Fair lending and CRA considerations also would have to be reanalyzed and adjusted.

The Board solicits comment on what amount of credit should be assumed as drawn by the consumer for purposes of the payment calculation for simultaneous HELOCs. For example, should the Board require creditors to assume a full draw (i.e., requested amount to be used) of the credit line, a 50% draw, or some other amount instead of the actual amount to be drawn by the consumer? The Board also solicits comment on whether it would facilitate compliance to provide a safe harbor where creditors assume the full credit line is drawn at consummation.

- MBA believes the standard should be to use the full draw amount—or the fully amortized amount of the credit limit—as this provides a fair reflection of the consumer's potential credit obligation at the time of consummation. If the consumer does not qualify with the fully drawn amount, the consumer would not be precluded from getting the loan, but would simply be afforded safeguards to protect against overextension. Using the "full draw amount" standard will force consumers to decrease the line amount to an amount that they would be able to service in the event the line is fully drawn.

The MBA perhaps more than the national trade association's will see up front the issues the proposed regulations impose on community banks with limited resources. It is important to shape the mortgage loan to meet the needs of the customer; all of these new rules will lead to very distorted shapes that will slow real estate credit, infuriate many customers when these rules are not of the banks' doing, and further slow the turbid economic response the economy is moving through.

On behalf of the MBA and its members, I urge you to modify the debit card account proposed rule, to eliminate price controls to the degree possible by the Federal Reserve and take into consideration fraud and other costs that have been ignored in the proposal.

Thank you for your time and consideration of these comments.

Sincerely,

(signed)

Max Cook

CEO and President